



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 1, 2008

CBCA 1063

KENNETH W. BATTLE, TRUSTEE FOR THE ESTATE OF MARTECH USA, INC.,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Robert G. Watt of Watt, Tieder, Hoffar & Fitzgerald, LLP, McLean, VA, counsel for Appellant.

Clary Simmonds, Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

Before Board Judges **SOMERS**, **GOODMAN**, and **DRUMMOND**.

SOMERS, Board Judge.

This appeal arises out of a contract between Martech USA, Inc. (Martech) and the Social Security Administration (SSA) for renovation services. After completing the scope of work under the contract, but before SSA paid Martech the remaining contract balance of \$153,792.40, Martech filed a petition for bankruptcy on December 19, 1993. Due to the bankruptcy filing, SSA deferred payment to Martech pending resolution of various government claims on other Martech projects.

On May 20, 1999, Kenneth W. Battley, the trustee in bankruptcy for the estate of Martech, submitted a certified claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601- 613, for the recovery of the outstanding contract balance. An SSA contracting officer denied the claim on November 1, 1999. In her final decision, the contracting officer stated:

After you submitted your request for payment to SSA in July 1999, SSA received the enclosed request from the United States Air Force to setoff any amount that is owed by SSA to Martech. We have confirmed that nothing in the bankruptcy proceeding precludes SSA from paying this Government setoff. As you know, the judge in the Martech bankruptcy proceeding issued an order in May, 1995, allowing Government setoff. Further, the Government's setoff claim has a greater priority than your claim for payment as the debtor-trustee in bankruptcy.

Based upon the foregoing, we have determined that no amount is payable to you.

Complaint ¶ 20, Exhibit 6. The decision concluded by stating that it was “the final decision of the Contracting Officer” and notified Martech of the ninety-day deadline for appeals to the General Services Board of Contract Appeals (GSBCA) and the twelve-month deadline for filing suits in the Court of Federal Claims. Mr. Battley received the final decision by certified mail on December 8, 1999.

Mr. Battley did not appeal the November 1, 1999, final decision to either the GSBCA or to the Court of Federal Claims. Instead, on April 19, 2006, Mr. Battley requested a second final decision from the SSA concerning the same contract balance. In the April 19 claim, Mr. Battley contends that he had recently learned that SSA had retained the contract balance, and that it had not been used to set off any debts due to the Air Force. Mr. Battley certified the second claim and requested a final decision. By letter dated September 5, 2006, SSA informed Mr. Battley that it did not intend to issue another final decision. On February 1, 2008, Mr. Battley filed an appeal with this Board based upon the “deemed denial” of his April 19, 2006, certified claim.

SSA moves the Board to dismiss the appeal for lack of jurisdiction. The agency notes that the contractor received the contracting officer's final decision on December 8, 1999; the decision advised the contractor that it could appeal to the GSBCA within the next ninety days; and the appeal was not filed until February 1, 2008, well beyond the ninety-day deadline. The parties do not dispute the timing and content of the communications at issue. Nonetheless,

Mr. Battley opposes the motion, arguing that the November 1, 1999, decision did not unequivocally and permanently deny the claim.

SSA's motion is well taken.

The CDA, which governs the Board's review of contracting officer decisions, requires that an appeal of such decision be filed "[w]ithin ninety days from the date of receipt of [the] decision." 41 U.S.C. § 606 (2000). The plain language of the CDA clearly confers finality and unreviewability of a contracting officer's decision that is not properly appealed within the statutory period provided. That finality is not limited to the contracting officer's authority to issue such a decision or the validity of the contracting officer's decision. *See, e.g., United States v. Kasler Electric Co.*, 123 F.3d 341, 346 (6th Cir. 1997). The statute affords the opportunity to challenge the authority and/or validity of the decision, provided the challenge is made within the statutory period. If a challenge is not made within the statutory period, section 605(b) mandates that the contracting officer's decision "be final and conclusive and not subject to review." 41 U.S.C. § 605(b). This deadline for filing has been strictly construed by the Court of Appeals for the Federal Circuit because the authorization to make the filing is a waiver of sovereign immunity. A late filing divests the Board of jurisdiction to consider the case on its merits. *Three Rivers Timber, Inc. v. Department of Agriculture*, CBCA 1044, 08-1 BCA ¶ 33,833, at 167,456 (citing *Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1381 (Fed. Cir. 2007); *D. L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *Robert T. Rafferty v. General Services Administration*, CBCA 617, 07-1 BCA ¶ 33,577, at 166,340). Accordingly, because Mr. Battley did not file the appeal until after the ninetieth day from his receipt of the decision in question, we do not have jurisdiction to consider the appeal.

In addition, we reject Mr. Battley's argument that the appeal could be filed on a "deemed denial" basis resulting from the contracting officer's failure to issue a final decision on the "new" April 19, 2006, claim. The established test for what constitutes a "new" claim is whether "claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists." *Environmental Safety Consultants, Inc.*, ASBCA 54995, 06-1 BCA ¶ 33,230, at 164,666 (citing *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)). In the April 19, 2006, claim, Mr. Battley sought the remaining contract balance of \$153,792.40, plus interest from November 7, 1994. The amount sought is identical to that sought in the original claim, with the exception of seeking CDA interest on the balance. The fact that Mr. Battley identified a date from which interest should run does not make the claim of April 19, 2006, a "new" claim. *Id.* (citing *Aerojet Ordnance Tennessee*, ASBCA 36089, 91-3 BCA ¶ 24,130, at 120,773 (as long as the essential character of a claim remains the same, revision of the amount is permitted)).

Decision

SSA's motion is granted. The case is **DISMISSED FOR LACK OF JURISDICTION.**

JERI KAYLENE SOMERS
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

JEROME M. DRUMMOND
Board Judge